IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,

Plaintiff,

v.

REDELK IRONHORSE THOMAS a/k/a
ROBERT HENRY WERNER,

Defendant.

No. CIV-03-0997 JEC/RLP
CR-00-284 JEC

MEMORANDUM OPINION AND ORDER

This matter is before the Court for preliminary consideration of Defendant's original and amended motions (CV Doc. #1 and #3) to vacate, set aside, or correct sentence (together the "motion"). *See* 28 U.S.C. § 2255 R. 4(b). Defendant was indicted and, after entering a plea agreement, convicted of mailing threatening communications in violation of 18 U.S.C. § 844(e). He appealed his conviction on the sole ground that the Government had breached the plea agreement. The Tenth Circuit affirmed, and Defendant's petition for writ of *certiorari* was denied. For the reasons below, Defendant's motion will be dismissed.

Defendant asserts eleven claims in his original motion and nine claims, some duplicative, in the amended motion. Initially, for purposes of analysis, he claims that his guilty plea was involuntary and resulted from ineffective assistance of counsel. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) (holding ineffectiveness claim not barred by failure to raise it on appeal). He alleges in his original claim 4 and amended claims 1 and 5 that his defense counsel failed to provide legal materials or research for him, file certain motions, include Defendant in negotiations with the government, advise him on a variety of issues, or, as argued to no avail on appeal, force the

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government to allocute at sentencing.

To succeed on a claim of ineffective assistance of counsel Defendant "must . . . show that [counsel's] performance fell below an objective standard of reasonableness and that [Defendant] was prejudiced thereby. *Romero v. Tansy*, 46 F.3d 1024, 1033 (10th Cir. 1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "Because [Defendant] has pled guilty, the prejudice prong of the *Strickland* standard requires [Defendant] to show 'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Romero*, 46 F.3d at 1033 (citing *Strickland*, 466 U.S. at 687-88, and quoting *Laycock v. New Mexico*, 880 F.2d 1184, 1187 (10th Cir. 1989)). The Court "may address the performance and prejudice components in any order, but need not address both if [Defendant] fails to make a sufficient showing of one." *Cooks v. Ward*, 165 F.3d 1283, 1292-93 (10th Cir. 1998) (citing *Strickland*, 466 U.S. at 697). Defendant's ineffectiveness claims are reviewed under these standards.

Defendant's allegations do not demonstrate prejudice under the *Strickland* standard and thus do not support a claim of involuntary guilty plea. To ensure that a guilty plea is voluntary "the accused should be afforded the advice of competent counsel, be aware of the charges against him, and understand the possible range of sentences." *Kemp v. Snow*, 464 F.2d 579, 580 (10th Cir. 1972); *see also United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir. 1990); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992) (ruling that counsel was not ineffective for failure to advise of collateral consequences such as deportation). Here, Defendant makes no allegation that he was unaware of the charges or the possible 24-month penalty, and the appellate opinion states that he was expressly aware of the maximum sentence. *United States v. Werner*, 317 F.3d 1168, 1169 (10th Cir. 2003) (Henry, J., dissenting). Because Defendant's allegations make no showing of prejudice resulting

from his entering a guilty plea, his motion does not state claims for ineffective assistance of counsel. *Tillis v. Ward*, No. 02-6389, 2003 WL 21101495, at *1 (10th Cir. May 15, 2003) (upholding dismissal of ineffectiveness claim in absence of showing of prejudice). These claims will be dismissed.

Defendant also raises a number of other procedural and substantive claims. These claims are barred, both by Defendant's plea and by his failure to raise them on appeal. First, "[t]he law in this circuit is absolutely clear; an unconditional guilty plea is a waiver of all nonjurisdictional defenses."[1] *United States v. Steele*, No. 01-7061, 2002 WL 27562, at **1 (10th Cir. Jan. 8, 2002) (citing *United States v. Kunzman*, 125 F.3d 1363, 1365 (10th Cir. 1997).

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)].

Tollett v. Henderson, 411 U.S. 258, 267 (1973); *quoted in Steele*, 2002 WL 27562, at **1. "Indeed, . . . the Supreme Court held that the defendants had waived their right to challenge their convictions based on double jeopardy because of the well-settled principle that ' "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." ' *United States v. Cockerham* 237 F.3d 1179 (10th Cir. 2001) (quoting *United*

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[1] Defendant raises two "jurisdictional" claims. He asserts that the Utah court "gave up" jurisdiction of Defendant's criminal and postconviction proceedings when an out-of-district judge was assigned to the matter, and he was denied a mandatory "Gershwen [presumably *Gerstein v. Pugh*, 420 U.S. 103 (1975)] hearing" before being indicted. Both claims are frivolous, *see* 28 U.S.C. § 292; *Leary v. United States*, 268 F.2d 623, 625 (9th Cir. 1959) (noting that court retains jurisdiction when out-of-district judge assigned); *United States v. Miller*, 532 F.2d 1335, 1339 (10th Cir. 1976) ("a conviction will not be vacated based on the ground that the defendant was detained pending trial without a determination of probable cause") (citing *Gerstein*), and will be dismissed.

States v. Broce, 488 U.S. 563, 574 (1989), and *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)).

Furthermore, these claims appear to be procedurally barred because Defendant did not raise them on appeal. "A § 2255 motion is not available to test the legality of a matter which should have been raised on direct appeal." *United States v. Cox*, 83 F.3d 336, 341 (10th Cir. 1996) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982). In his appeal, Defendant raised only the question of breach of the plea agreement by the Government. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.' " *Bousley v. United States*, 523 U.S. 614, 622 (1998). Defendant does not assert actual innocence or show "cause" for failing to raise these claims on appeal. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (" 'cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him.") (emphasis in original), *quoted in Williford v. Champion*, No. 01-7053, 2001 WL 1478631, at **2 (10th Cir. Nov. 23, 2001). These claims are procedurally barred.

Last, no relief is available on Defendant's claims that he received ineffective assistance of counsel on appeal (original claim 11 and amended claim 1). His factual allegations are that counsel refused to raise on appeal certain of the issues presented in the instant motion. Under the *Strickland* standard, "[w]hen a defendant alleges his appellate counsel rendered ineffective assistance by failing to raise an issue on appeal, we examine the merits of the omitted issue. If the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." *United States v. Cook*, 45 F.3d 388, 392-93 (10th Cir. 1995), *quoted in United States v. Kell*, No. 03-6223, 2004 WL 1690373, at *3 (10th Cir. July 29, 2004). As noted above,

Defendant's "jurisdictional" claims are frivolous. Furthermore, the Court finds no merit in Defendant's claims of bias; the alleged denials of self-representation, access to legal materials, discovery, withdrawal of plea, or challenge to grand jury testimony; judicial misconduct; failure to accept plea agreement; or interference with impanelment of jury. His claims of ineffective assistance of counsel on appeal will be denied. *Cook*, 45 F.3d at 392-93. Defendant is not entitled to relief, *see* 28 U.S.C. § 2255 R. 4(b), and his motion will be dismissed.

IT IS THEREFORE ORDERED that Defendant's original and amended motions (CV Doc. #1 and #3) to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 are DISMISSED with prejudice; and, pursuant to Fed.R.Civ.P. 58(a)(2)(A)(iii), *United States v. Sam*, No. 02-2307, 2003 WL 21702490, at *1 (10th Cir. July 23, 2003), judgment will be entered in accordance with this opinion.

UNITED STATES DISTRICT JUDGE

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United States District Court
for the
District of Utah
August 27, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00997

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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